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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL, ET AL., PETITIONERS

v.

R. B. HOOD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 145–159), is not officially reported. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 168–178) is reported in 150 F. 2d 96.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 7, 1945 (R. 179). The petition for a writ of certiorari was filed on August 20, 1945, and was granted October 22, 1945. The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the district court erred in dismissing the instant suit on the ground that it does not arise "under the Constitution or laws of the United States" within the meaning of Section 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1).

STATUTES INVOLVED

Section 24 (1) (a) of the Judicial Code, 28 U. S. C. § 41 (1) (a), provides in part:

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *.

Section 37 of the Judicial Code, 28 U. S. C. § 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no

further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

STATEMENT

Following an extensive investigation by the Federal Bureau of Investigation ("F. B. I."), the Federal Grand Jury for the Southern District of California returned a secret indictment (No. 15759) on December 17, 1942, in which the twelve petitioners, leaders and members of a voluntary association known as "Mankind United," were charged with conspiracy to commit sedition, a felony under the Act of June 15, 1917, Sec. 4, 40 Stat. 219, 50 U. S. C. § 34 (R. 4, 6–8, 34). Warrants for the arrest of all the petitioners, to be executed either by the United States Marshal or by F. B. I. agents, were immediately issued on the same day by the United States District Court for the Southern District of California, and were handed to F. B. I. agents in that District for service (R. 35). Petitioners Bell, Burkey, Gloeckler, and Miller resided outside the Southern District of California and, as to them, a return of *non est* was made by the United States Marshal at Los Angeles on the afternoon of December 17, 1942 (R. 4, 7, 35). The United States Attorney then advised the respondent R. B. Hood, F. B. I. Special Agent in Charge in Los Angeles, of the issuance and return of the warrants for the

arrest of petitioners and directed their apprehension, authorizing the arrest of those beyond the Southern District as fugitives for whom warrants were outstanding (R. 35).

Thereupon, the respondent Hood notified the San Francisco office of the F. B. I. by teletype of the indictment, the issuance of the warrants, their delivery to Hood, the returns *non est* as to petitioners Bell, Burkey, Gloeckler, and Miller, and the directions from the United States Attorney for the arrest of petitioners (R. 35–36, 44, 56, 62, 66). In compliance with these directions, F. B. I. agents from the San Francisco office, respondents herein, arrested the four above-named petitioners at San Francisco, Oakland, Denair, and Mountain View, respectively,[1] at approximately 7:30 A. M., December 18, 1942 (R. 44, 56, 62, 66). At the same time, the remaining eight petitioners were arrested by other F. B. I. agents (also respondents herein) at San Diego, Los Angeles, and Fresno, all within the Southern District of California, under the warrants of arrest issued by the district court (R. 69–70, 73, 76, 78–79, 82, 86–87, 89, 93).[2] In connection with each arrest, the arresting agents

[1] All these points are in California, but outside the Southern Judicial District.

[2] The F. B. I. timed all the arrests for 7:30 A. M. on December 18, 1942, in order to avoid the results of premature publicity (R. 86, 94).

searched the premises of each petitioner and took custody of pamphlets, circulars and other property known to such agents to be connected with the affairs of "Mankind United" and the offense charged in the indictment (R. 51–53, 57–59, 64, 68, 70–71, 74–75, 76–77, 79–80, 83, 87, 90–91, 94, 96).

Shortly after these arrests, several of the petitioners made a motion in the criminal case to suppress and return evidence. The motion charged that the Government had violated the Fourth and Fifth Amendments (1) in taking Bell, Burkey, Gloeckler, and Miller into custody without warrants of arrest and without reasonable ground to believe that they had committed a felony and were likely to escape before warrants could be obtained; and (2) in taking "Mankind United" pamphlets and circulars without search warrants. After a full hearing on affidavits and testimony in open court, the motions to suppress were denied on February 13, 1943. *United States* v. *Bell*, 48 F. Supp. 986 (S. D. Cal.). Thereafter, all the petitioners except Gloeckler and Kelso were tried and convicted of conspiracy to commit sedition. Judgment was rendered on May 10, 1943, imposing a fine upon petitioners Askew and Jakeman and sentencing the remaining eight petitioners to imprisonment. An appeal from the convictions is

now pending in the Circuit Court of Appeals for the Ninth Circuit.[3]

On April 7, 1945, all twelve petitioners[4] instituted the present suit against Hood and the other F. B. I. agents who made the arrests on December 18, 1942,[5] charging that the defendants had "unlawfully conspired with each other to act beyond their authority (R. 8)" as F. B. I. agents, and had

> agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments * * * to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of "Mankind United", and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreason-

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[3] Record on appeal in *Bell et al.* v. *United States*, No. 10432, C. C. A. 9.

[4] Petitioner Bell sued individually and in behalf of "'Mankind United' and The Associates thereof" (R. 2).

[5] Merle Armstrong, a member of the City of Los Angeles Police Force, was also named as a defendant in the complaint (R. 8), but was dropped from the suit in the court below (R. 171; cf. Pet. Br. 8, note 6b).

> ably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid (R. 9).

The complaint further alleged that in order to carry out this conspiracy, the respondents broke into and entered petitioners' premises; arrested and imprisoned them and failed to take them immediately before a committing officer; arrested four without warrants, in the absence of any reasonable ground to believe them guilty of a Federal felony, or any likelihood that they would escape before a warrant could be obtained; searched their homes without search warrants; and seized and carried away their books, papers and effects (R. 9–24).*

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*The general allegations as to all the petitioners (R. 8-9) were followed by specific allegations as to each one (R. 10–22). The allegations as to petitioner Bell (Division Superintendent of "Mankind United", whose apartment served as the organization's headquarters, R. 4, 10), illustrate those made as to each of the four petitioners apprehended without a warrant of arrest by San Francisco F. B. I. agents: That Bell's residence in San Francisco was broken into on the morning of December 18, 1942, by certain of the respondents without search or arrest warrants; that Bell was placed under arrest and his premises were searched; that he was held in custody at his premises until 2:00 P. M. and then taken before a committing officer; that these respondents, at 2:00 P. M., took from his premises documents and records of "Mankind United" as well as private papers, documents, and cash; and that he was not permitted to see his attorney, to have counsel, or to communicate with anyone (R. 10–12).

For these acts, allegedly committed by respondents "beyond the scope of [their] authority" and in violation of petitioners' rights under the Fourth and Fifth Amendments (R. 10), petitioners demanded damages totalling more than $1,000,000 (R. 24–29).[7] Jurisdiction of the district court was alleged to be founded "upon the Federal question involving the rights of [petitioners] to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and * * * to be free from unreasonable searches and seizures" (R. 3–4). The same paragraph of the complaint stated that respondents were F. B. I. agents and claim to

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The allegations as to petitioner Askew illustrate those made as to the eight petitioners arrested within the Southern District of California under warrants of arrest: That two of the defendants entered her premises at 7:30 A. M., Friday, December 18, 1942, and falsely imprisoned her thereon, searched the premises against her will and without a search warrant, removed a large number of documents of "Mankind United" as well as private papers and documents, and held her in the San Diego city jail "until noon Saturday," without arraignment or commitment (R. 12).

[7] On account of false imprisonment: $50,000 for Bell, and $20,000 for each of the other petitioners; on account of breaking and entering the premises of each petitioner but Bell, $5,000; on account of searching Bell's home and seizing his books, papers and effects, $5,000; on account of disruption to the business of "Mankind United", $100,000; on account of deprivation of petitioners' constitutional rights, "mental pain and anguish and suffering" and injury to their reputation, $100,000 for Bell and $50,000 for each of the others (R. 24–29).

have acted under 5 U. S. C. 300 and 300a (R. 3–4).[5]

Respondents moved to dismiss the complaint and for summary judgment upon the grounds that (a) the acts were done within the scope of their authority as officers of the United States, and (b) the searches and seizures were incidental to lawful arrests and were valid (R. 31–34, 36–37, 40–41, 42–43, 46). Affidavits were filed by respondents (R. 43–97) and counteraffidavits by some of the petitioners (R. 97–134); and after hearing the motions (R. 156), the court, *sua sponte*, dismissed the suit for want of jurisdiction pursuant to Section 37 of the Judicial Code, 28 U. S. C. 80 (see pp. 2–3, *supra*), holding that the case did not arise under the Constitution or laws of the United States (R. 149–151, 137). The Circuit Court of Appeals affirmed (R. 179).

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[5] 5 U. S. C. 300 authorizes the Attorney General to appoint officers and to vest them with necessary authority "for the detection and prosecution of crimes against the United States." 5 U. S. C. 300a empowers the Director, Assistant Directors, agents, and inspectors of the F. B. I. to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer.

SUMMARY OF ARGUMENT

The sole question on the present record is whether the complaint sets up a case which "arises under the Constitution or laws of the United States" within the meaning of Section 24 (1) of the Judicial Code.

We submit that it does not. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action, it must be disclosed upon the face of the complaint, and it is unavailing as a basis of jurisdiction where the asserted right is no part of the plaintiff's case and is alleged simply to anticipate or reply to a probable defense.

Here the cause of action is the established common law tort of trespass to person and property, made actionable in this instance by California law. It is significant that no damages are sought in respect of the conspiracy to commit these torts. Since the constitutional provisions here involved are prohibitions against the federal government, which create no right to money damages, that right rests on the common law concept of unauthorized officials as individual trespassers. The scope of the defendants' statutory authority goes only to the question of justification, and affords no basis of federal jurisdiction. The only federal question here is that pleaded by way of anticipatory replication

to a probable defense. Accordingly, the lower courts have uniformly dismissed cases such as this one for want of federal jurisdiction.

Moreover, the allegations of the complaint negative any controversy between the parties as to the scope of the statutory and constitutional provisions involved. To the extent that a federal question would remain in the record after trial, it would be available for appellate review by this Court, but that circumstance, obviously, does not establish the existence of a federal question for purposes of original federal jurisdiction.

Petitioners' authorities are either cases where the right did not exist at common law and was created by a federal statute, or else, as in suits to enjoin prosecutions under an allegedly invalid statute, clearly involved construction of the constitutional and statutory provisions relied upon. The injunction cases are further distinguishable since the jurisdiction of the federal courts in suits to enjoin a federal officer probably rests on the circumstance that a state court lacks such power, for the same basic reason that it lacks power to issue a mandamus or a habeas corpus to a federal officer.

Petitioners' "Proposed Amended Complaint", first filed in the court below a year after the judgment of dismissal appealed from, is subject to the same objections as the original pleading. The court below did not abuse its discretion in refusing to reverse the judgment of the district

court with directions to that tribunal to give petitioners leave to amend. Indeed, the court below probably lacked power to grant such relief.

The present case could, by appropriate legislation, be brought within the constitutional jurisdiction of the district courts, either by permitting suits of this character to be brought there originally or by authorizing F. B. I. agents to remove cases brought against them. But Congress has not legislated to that effect. Reversal here would not protect F. B. I. agents; they would still be unable to remove where they were sued simply as common law trespassers without mention of their official status. But reversal would have the effect of bringing within the original jurisdiction of the federal courts, and hence allowing the parties to oust the original jurisdiction of the state courts, in all tort actions for false arrest, false imprisonment, and unlawful searches and seizures brought against every state and municipal law enforcement officer in the land. Such a result would follow, in the event of reversal, whenever a plaintiff alleged (instead of violation of the Fourth and Fifth Amendments as here) a violation of the Fourteenth Amendment.

ARGUMENT

The sole question before this Court on the present record is whether the complaint sets up a case which "arises under the Constitution or

laws of the United States." Judicial Code, § 24 (1); 28 U. S. C. § 41 (1).

Petitioners allege that respondents, agents of the Federal Bureau of Investigation conspired to act beyond their statutory authority as such agents and to deprive petitioners of the right guaranteed them by the Fourth Amendment to be free from unreasonable searches and seizures, and of the right guaranteed by the Fifth Amendment to be free from deprivation of liberty without due process of law by false and unlawful imprisonment (R. 3–4, 8–9). The complaint seeks damages for the breaking and entry of private premises, for the seizure of personal effects, and for the arrest and imprisonment of individuals (R. 24–28).

Both courts below held that the complaint failed to state a cause of action within § 24 (1), Judicial Code. We submit that they were right, both on authority of similar decisions elsewhere (*Taylor* v. *DeHart*, 22 F. (2d) 206 (W. D. Mo.); *Viles* v. *Symes*, 129 F. (2d) 828 (C. C. A. 10), certiorari denied, 317 U. S. 633), as well as upon analysis of the complaint against the background of established tests as to what constitutes a case involving a federal question.

I. THE CASE DOES NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES

Discussion of when a cause "arises under the Constitution or laws of the United States"

within § 24 (1) of the Judicial Code may well commence with *Gully* v. *First National Bank*, 299 U. S. 109, where Mr. Justice Cardozo analyzed the precedents and, speaking for a unanimous Court, said (pp. 113–114):

> Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 817–828; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11. Modern statutes have greatly diminished the importance of those decisions by narrowing their scope. *Gay* v. *Ruff*, 292 U. S. 25, 35; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. Federal incorporation is now abolished as a ground of federal jurisdiction except where the United States holds more than one-half the stock. Act of February 13, 1925, c. 229, § 12, 43 Stat. 936, 941. Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising

> under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Cf. First National Bank* v. *Williams*, *supra*; *Hopkins* v. *Walker*, 244 U. S. 486, 489; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507. Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them. *Puerto Rico* v. *Russell & Co.*, *supra*. "We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now." *Ibid.* Today, even more clearly than in the past, "the federal nature of the right to be established is decisive—not the source of the authority to establish it." *Ibid.*

Accordingly, in the *Gully* case, this Court held that a suit brought by a state tax collector against a national bank for taxes assumed upon acquisition of the property of a predecessor bank did not arise under the laws of the United States simply because it was alleged that the tax would have been void unless permitted by an Act of Congress relative to the taxation of national banks.

A number of tests laid down in the *Gully* case are applicable here. "To bring a case within the

statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First National Bank*, *supra*, at 112; *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. Stated somewhat differently, the suit must be one "to enforce a right created by a law of the United States." *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. Moreover, to sustain federal jurisdiction, the controversy arising under the Constitution or laws of the United States "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal". *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113; *Walker* v. *Collins*, 167 U. S. 57, 59; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74; *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454. And "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113; *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 353.

Measured by these criteria, the court below properly held that there was no original federal jurisdiction in this case.

1. *Analysis of the complaint shows that the right here relied upon is created by state law*

The cause of action alleged in the complaint is the familiar common law tort of trespass to person and property, which has been actionable since at least the turn of the Fourteenth Century.[9] The complaint seeks damages on account of the breaking and entry of private premises, the seizure of personal effects, and the arrest and imprisonment of individuals (R. 24–28), all alleged to be unlawful. The allegations, if proved, would without more establish the common law torts of trespass *quare clausum fregit*, trespass *de bonis asportatis*, and trespass *vi et armis*. 3 Bl. Comm. *151, 208–211; Shipman, *Handbook of Common-Law Pleading* (Ballantine's 3d ed. 1923) § 35. The California Code enacts the same torts in statutory form and provides the right to recover damages. *Calif. Civ. Code* (Deering 1937) § 3281.

The allegations of a conspiracy on the part of the respondents to act beyond their statutory authority and to deprive the petitioners of their constitutional rights (R. 8–9) are no part of the cause of action, and no damages are sought on account of the conspiracy (see R. 24–28). Nor do any of the statutory or constitutional provisions cited

[9] Holdsworth, *History of English Law* (3rd ed. 1923), 364–365; 2 Pollock & Maitland, *History of English Law* (1st ed. 1895), 525–526; Ames, *Lectures on Legal History* (1913), 56; Maitland, *Equity and the Forms of Action* (1932 ed.), 342–344.

in the complaint give rise to a right of action for damages. The Acts of May 14, 1940, 54 Stat. 181, 201, and June 18, 1934, 48 Stat. 1008 (5 U. S. C. §§ 300 and 300a) grant certain powers to federal officers to make arrests and seizures; they do not purport to authorize the recovery of damages at law if those powers are exceeded.[10] This is readily demonstrable by considering the effect of conduct prohibited by the cited statutes, but not constituting a common law tort, such as the unauthorized service of a subpoena or warrant. In such a case, there would be no actionable tort unless the local law recognized such conduct as a tort. For like reasons, an arrest or seizure beyond the statutory authority would be actionable only because those acts would constitute tortious interference with person and property, for which the common law or the state law authorizes recovery.

Similarly, the guarantees of the Fourth and Fifth Amendments, invoked in the complaint, do

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[10] Cf. Act of March 20, 1936, 49 Stat. 1184 (31 U. S. C. § 224b) authorizing the Attorney General to "consider, adjust, and determine" claims up to $500 on account of damage to person or property "caused by the Director, any Assistant Director, inspector, or special agent" of the F. B. I. "acting within the scope of his employment," and to certify the amount found due "to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor." See also Act of December 28, 1922, 42 Stat. 1066 (31 U. S. C. § 215) for a similar general authorization applicable to all departments and establishments (other than the War Department, as to which see Act of July 3, 1943, 57 Stat. 372 (31 U. S. C. § 223b)).

not create a right to money damages for their violation. They are prohibitions against the federal government; they do not create rights against private individuals. *Corrigan* v. *Buckley*, 271 U. S. 323; *Burdeau* v. *McDowell*, 256 U. S. 465, 472, 475. The right to be free from unreasonable searches and seizures is a common law right, *Entick* v. *Carrington*, 19 How. St. Tr. 1029; *Boyd* v. *United States*, 116 U. S. 616, which the Constitution does not create but simply protects from invasion by the general government.

That a damage suit against a federal officer on account of unauthorized conduct is a creature of local and not federal law, is also established by the cases involving the question of whether the sovereign immunity prohibits suits against government officers principally based upon acts committed in their official capacity. Where suits to obtain an injunction or judgment for damages against an officer have been held not to be barred by the sovereign's immunity, it has normally been upon the theory that the defendants are sued as individual trespassers for conduct which would be tortious if done by private persons. Cf. *Ex Parte Young*, 209 U. S. 123; *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288–290. Here also, the theory of petitioners' suit is that respondents must be treated as individual trespassers, as answerable as though they were not acting for the Government.

and that their cloak of official immunity has been stripped from them because they have exceeded statutory and constitutional bounds. For such a cause of action, the state law must necessarily be invoked. Indeed, the traditional common law remedy against public officers charged with making unlawful arrests, searches and seizures, is a suit to recover damages from them as individual trespassers under the local law. *Day* v. *Gallup*, 2 Wall. 97; *Buck* v. *Colbath*, 3 Wall. 334, 347; *Boyd* v. *United States*, 116 U. S. 616, 625–628; *Walker* v. *Collins*, 167 U. S. 57; Throop, *Public Officers* (1892) § 724; Mechem, *Public Officers* (1890) § 770, 778; cf. *Freeman* v. *Howe*, 24 How. 450.

Petitioners' cases are not to the contrary. They involve, for the most part, cases asserting rights which were created by federal law. Thus, *Belknap* v. *Schild*, 161 U. S. 10 (Pet. Br. 13), and *Cammeyer* v. *Newton*, 94 U. S. 225 (Pet. Br. 14), were actions for patent infringement. *Little* v. *Barreme*, 2 Cranch 170 (Pet. Br. 13), was a libel in admiralty seeking a forfeiture. The right asserted in *Tunstall* v. *Brotherhood*, 323 U. S. 210 (Pet. Br. 11), was one which did not exist at common law, *viz.*, the plaintiff's right, created by the Railway Labor Act, of being represented by the defendant brotherhood for purposes of collective bargaining. In like manner, the right asserted in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (Pet. Br. 14–15) to have

mail delivered by the Postmaster General, in *Waite* v. *Macy*, 246 U. S. 606 (Pet. Br. 14), to have tea passed through the customs without interference from the Board of Tea Appeals, and in *Perkins* v. *Elg*, 307 U. S. 325 (Pet. Br. 15), to be issued a passport, were rights created by federal statute and not grounded on common law.

Bock v. *Perkins*, 139 U. S. 628 (Pet. Br. 14), was a suit against a United States marshal arising out of his acts as such. This Court held that the case arose under the laws of the United States since (139 U. S. at 630) "for any failure in * * * regard [to his duties] he would be liable to suit by any one thereby injured. Rev. Stat. § 784." *Howard* v. *United States*, 184 U. S. 676 (Pet. Br. 14) was a suit brought on the bond of a clerk of a United States court. This Court upheld federal jurisdiction by analogy to the cases involving suits on marshals' bonds. In *Rogers* v. *The Marshal*, 1 Wall. 644 (Pet. Br. 14), the jurisdictional problem does not appear to have been raised. But the case involved a suit on a marshal's bond, and hence presumably fell within the purview of R. S. 784. Where, however, the marshal is sued in tort, it is clear that the cause is held not to arise under the Constitution or laws of the United States. See *Walker* v. *Collins*, 167 U. S. 57, discussed below, p. 24.

The other cases cited by petitioners are clearly out of point, as they arose either on diversity of

citizenship,[11] or else came within the federal jurisdiction by virtue of a special removal statute,[12] or else were brought under the general equitable jurisdiction of the District of Columbia courts.[13] Certain other injunction cases are further discussed and distinguished below, pp. 30–38.

2. *The scope of defendants' statutory authority goes only to the question of justification*

The scope of statutory or constitutional limits upon the authority of an officer sued for a trespass is of course frequently pertinent, but as a matter of accurate analysis it is no part of the cause of action but arises only defensively, when the officer seeks to justify conduct which but for his official authority would be tortious.

Thus, in the historic case of *Entick* v. *Carrington, supra,* where an action of trespass was brought against government officers for entering the plaintiff's dwelling house, breaking open his desks and boxes, and searching and examining

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[11] *Mitchell* v. *Harmony*, 13 How. 115, Pet. Br. 13 (see 13 How. at 136–137); *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, Pet. Br. 12 (see 317 U. S. at 173–174). The language from the latter case quoted in Pet. Br. 12–13 considered, not whether the district court had original jurisdiction, but whether the state or federal rule as to estoppel should be controlling in a suit on a license agreement by a patent licensee.

[12] *Tracy* v. *Swartwout*, 10 Pet. 80, Pet. Br. 13, removed under the "Force Act" provision for the protection of revenue officers, now § 33, Judicial Code, 28 U. S. C. § 76.

[13] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, Pet. Br. 14; *Perkins* v. *Elg*, 307 U. S. 325, Pet. Br. 15.

his papers, the defendants set up as justification that they had acted under a general search warrant issued in a case of seditious libel. Lord Camden characterized the cause of action and the defense as follows (19 How. St. Tr. at 1066):

> * * * By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant and the plaintiff must have judgment.
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> According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.[14]

[14] See also *Boyd* v. *United States*, 116 U. S. 616, 625–626, referring to the celebrated action of trespass by John Wilkes arising out of the search and seizure of Wilkes' papers by authority of a warrant issued by a Secretary of State.

Similarly, in *Walker* v. *Collins*, 167 U. S. 57, an action to recover damages for unlawful seizure of property was brought in a state court, and the defense was that the defendants were acting as United States marshals and deputies, under an order of attachment issued by a federal court. The defendants thereafter removed the cause to the federal court "upon the ground that the action and the defence thereto arose under the laws of the United States" (167 U. S. at 57–58), but the plaintiff recovered judgment on the merits. On a writ of error this Court held that the cause was improperly removed because "in the complaint * * * there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred" (*Id.* at 59).[15]

3. *A case does not involve a federal question when that question is alleged as an anticipatory replication to a probable defense*

The nature of the present cause of action as a trespass unauthorized by law is not altered because the plaintiffs saw fit to anticipate the defense that the defendants acted under official authority, and to reply thereto by charging that

[15] The Court there cited and relied upon *Chappell* v. *Waterworth*, 155 U. S. 102, 108, which held that an ejectment suit in a state court was improperly removed to the federal court upon the defendant's petition that he was holding possession under the authority of the United States.

the acts were unauthorized by statute or the Constitution. Not only must the elements of Federal jurisdiction "be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal", but "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense" (*Gully* v. *First Nat. Bank*, 299 U. S. 109, 113, and cases cited; see also *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 353).

Stated somewhat differently, petitioners may not invoke federal jurisdiction by stating a defense which the respondents "might possibly set up and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 153; *Boston & Mont. Consol. C. & S. M. Co.* v. *Montana Ore Purch. Co.*, 188 U. S. 632, 638–639. It is immaterial that the new Federal Rules of Civil Procedure may permit the plaintiff to include in his complaint an anticipatory replication to a probable defense (*e. g.*, Rule 8 (c)), for the rules were not intended to enlarge the statutory jurisdiction of the district courts.[16]

[16] "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." Rule 82; see Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. § 723b; *United States* v. *Sherwood*, 312 U. S. 584.

4. *The decision below is in accord with rulings in other circuits*

The lower federal courts have accordingly uniformly declined to take jurisdiction over damage suits against federal officers, even after the new Federal Rules, although violations of a federal statute or a constitutional provision were alleged in the complaint.

In *Viles* v. *Symes*, 129 F. (2d) 828 (C. C. A. 10), certiorari denied, 317 U. S. 633, rehearing denied, 317 U. S. 711, an action in the federal court was brought against the United States attorney, the United States district judge, and others, to recover damages for malicious prosecution and false imprisonment, growing out of a criminal proceeding against plaintiff under the bankruptcy laws. The complaint asserted that the action arose under the First, Fifth, and Sixth Amendments to the Constitution, and a federal statute relating to the allowance of bail (R. S. 1015, 18 U. S. C. 596). The substance of the complaint, strikingly similar to the one at bar, charged that the defendants had conspired to obtain, and had obtained, the plaintiff's indictment, conviction, sentence, and imprisonment, by false testimony and with knowledge that the plaintiff was innocent. The complaint further charged that after the indictment, the plaintiff was arrested at San Francisco and illegally imprisoned for 24 hours pending bail, which he was then required to make at a cost of $200; and that after

his conviction he was committed by the defendant, the district judge, to a psychopathic hospital without a hearing and deprived of liberty without due process of law for several months. Damages were sought in the amount of $200,000.

The Circuit Court of Appeals held that plaintiffs' "right to recover has its genesis and is governed by the local law of the forum"; and that while the Constitution protects the plaintiffs' "right to due process of law and to a speedy, fair and impartial trial * * * these rights as here asserted lurk in the background of his suit, and do not, in these circumstances, confer jurisdiction upon the courts of the United States" (129 F. 2d at 830–831).

For the same reasons, the court below was correct in treating as "allegations of probable defenses" (R. 178) the averments in the present complaint (R. 4) that respondents "claim to have acted under and by virtue of" 5 U. S. C. 300 and 300a, and that their conduct violated petitioners' rights under the Fourth and Fifth Amendments (R. 3, 9). These averments did not alter the essential character of petitioners' cause of action as an alleged trespass to person and property, for which the right to damages is afforded by local and not federal law. The complaint presents simply another instance of a pleader's device to confer federal jurisdiction where none exists. See Dobie, *Federal Procedure* (1928) § 85, p. 336.

A very similar situation was presented in *Taylor* v. *De Hart*, 22 F. 2d 206 (W. D. Mo.), appeal dismissed for want of jurisdiction, 274 U. S. 726. There the plaintiff brought an action at law for damages, alleging that the defendants, under color of their several offices as prohibition agents, conspired to search, and actually did search, his residence without a lawful search warrant, and therefore in violation of the Fourth Amendment and also in violation of the federal Prohibition Act.

The court held that this pleading did not bring the action within § 24 (1), Judicial Code, saying (22 F. 2d at 207–208):

> It will be noted from the petition challenged in the instant case that the right to recover does not depend upon the *construction* of the Fourth Amendment or upon the question of its *application*, and the same is true with respect to the federal Prohibition Law. The *application* and the *construction* of the Fourth Amendment and the federal Prohibition Act are not in controversy.
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> * * * * *
>
> The scope and effect of the Fourth Amendment and the federal Prohibition Act are not brought in question. Plaintiff asserts the violation of a well-known right vouchsafed to him unequivocally under said constitutional provision and statutes.
>
> * * * * *

> There is no such controversy [in regard to the operation and effect of the Constitution] here. The operation and effect of the constitutional provision relied upon, as well as the federal Prohibition Act, are well known and undisputed. * * * *

In the case at bar, similarly, the allegations of the complaint negative any dispute or controversy respecting the validity, construction or effect of either the Fourth or Fifth Amendments or of 5 U. S. C. §§ 300 and 300a. It is alleged that the defendants "unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents * * * and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments * * *" (R. 8–9). That is to say, the complaint suggests that there was no difference between the parties as to the scope of the defendants' official authority or the scope of the plaintiff's constitutional rights; it alleges that defendants conspired to act beyond any possible limit of their authority and to invade the admitted boundaries of plaintiffs' immunities. The present case accordingly did not, on the face of the complaint, require the district court to construe either the statutes or the constitutional provisions referred to; and the court below so held (R. 174).

Petitioners now, as they admit in their brief, have pending an action against respondents in

the California state courts seeking damages for the very cause of action here in suit.[17] To the extent which, after the factual issues there have been sifted out and determined at the trial, a federal question remains in the record, it is available for ultimate review here. But of course the presence of a federal question for purposes of appellate review in this Court by no means establishes the presence of a federal question for purposes of original jurisdiction in the federal district courts. See *New Orleans* v. *Benjamin*, 153 U. S. 411; *Joy* v. *St. Louis*, 201 U. S. 332.

5. *The injunction cases are distinguishable on several grounds.*

There is nothing in the foregoing reasoning contrary to what is decided in the remaining injunction cases relied upon by petitioners,[18] which involve suits to enjoin enforcement of statutes or regulations on the ground of invalidity, constitutional or otherwise. This includes cases such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (Pet. Br. 15), and would include *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (Pet. Br. 14) if the Secretary of War in that case had been sued elsewhere than in the District of Columbia.

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[17] While the claim for damages for unlawful imprisonment has been dismissed under the statute of limitations (Pet. Br. 19, n. 13), the remainder of the claims were held not to be barred, and are awaiting trial on the merits.

[18] See pp. 20–22, *supra*, for a discussion of petitioners' other authorities.

We submit that the true ground of distinction is that in the cited cases the prayer for an injunction against the institution of criminal prosecutions for violation of the statutes assailed as unconstitutional or otherwise invalid made those cases necessarily proceedings arising under the Constitution or laws of the United States, whereas in tort actions the statute is measurably farther in the background. In the first class of cases, the proceeding—whatever the juristic device employed to surmount the barrier of sovereign immunity—is really directed against the statute; in the second it is the individuals who are the objects of suit, as damages are alleged. In the first class of cases the controversy would evaporate were the statute out of the way, in the second there would still be a tort action regardless of the statute. The difference may be one of degree, but it is none the less workable for all that. As Mr. Justice Cardozo said of this problem in *Gully* v. *First Nat. Bank*, 299 U. S. 109, 117–118, 118,

> What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. * * * Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation,

> so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

An analogous distinction is that used in determining when a suit for injunction against state action shall be heard by a district court of three judges under § 266 Judicial Code, 28 U. S. C. § 380. Where it is the enforcement of a state statute or regulation which is sought to be enjoined, three judges must be convened. E. g., *Sterling* v. *Constantin*, 287 U. S. 378. But where the conduct from which relief is sought is not such as the state law could be reasonably construed to authorize, then the cause must be heard before a single judge. *Phillips* v. *United States*, 312 U. S. 246. The same practical exercise of judgment in the present situation distinguishes the suits to enjoin prosecutions on the ground of infirmity in the controlling statute from actions for damages for tort where the statute is available

only defensively or where the constitutional provision in question enters the case only by way of replication.

The injunction cases are also distinguishable because, by analogy to the rule that state courts may not mandamus federal officers or issue writs of habeas corpus to inquire into the detention of persons in their custody, state courts are similarly without power to enjoin a federal officer. That being so, the only forum for such suits is in a federal court.[29]

While the precise question of the lack of power of state courts to enjoin a federal officer seems never to have been considered by this Court, we think that such lack of power is clearly established upon consideration of analogous principles and of the fundamental relationship between the states and the Nation.

It has long been settled law that the process of a state court could not issue to interfere with the prosecution of suits in the federal courts or with the execution of judgments of federal courts.[30]

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[29] We have not otherwise distinguished *Goltra* v. *Weeks*, 271 U. S. 536, Pet. Br. 14, where the question of jurisdiction (apart from the suit against the United States aspect) was neither argued by counsel nor considered by the Court.

[30] Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359.

[31] *McKim* v. *Voorhies*, 7 Cranch 279; *Freeman* v. *Howe*, 24 How. 450; *Riggs* v. *Johnson County*, 6 Wall. 166; *United States* v. *Council of Keokuk*, 6 Wall. 514.

After preliminary uncertainty,[22] this Court settled that both the judicial and the executive branches of the Government were to be protected against interference from state courts, when the interference takes the form of a writ of habeas corpus. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; see *Robb* v. *Connolly*, 111 U. S. 624, 639; *Ex parte Royall*, 117 U. S. 241, 249. In *Tarble's Case*, the Court explained the reason for the rule (13 Wall. at 409):

> It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

This policy applies equally, if not *a fortiori*, to the direct interference with federal functions which arises when the state court issues an injunction against the federal officer. If it is necessary for the Federal Government to have an unrestrained custody of its prisoners, it would seem an equal necessity that its functions be performed without interference by a state court decree.

Issuance of an injunction by a state court against a federal officer would seem also to be a consequence of the settled principle that a state court is without power to issue writs of mandamus to fed-

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[22] Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 353–357.

eral officials. *McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Shockley*, 17 F. (2d) 133 (N. D. Ohio); cf. *Boske* v. *Comingore*, 177 U. S. 459. The writs of mandamus and injunction differ only in form so far as this issue is concerned; each is an undertaking by a state court to control the performance of federal duties.

The Court in *Keely* v. *Sanders*, 99 U. S. 441, made it plain that the principle of the habeas corpus and the mandamus cases would apply equally to injunctions. There the Court declared (99 U. S. at 443):

> No State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action.

While it is possible to distinguish the *Keely* case upon the traditional reluctance to restrain the collection of federal taxes, its statement is cast in terms of a principle of general application.

The state courts, so far as they have considered this question, seem generally to have ruled that they were without power to control a federal official, whether by writ of mandamus or by injunction. *Parry* v. *Delaney*, 310 Mass. 107, 37 N. E. 2d 249 (Pet. Br. 22); *Brewer* v. *Kidd*, 23 Mich. 440; *Hinkle* v. *Town of Franklin*, 118 W. Va. 585, 191 S. E. 291; *Goldstein* v. *Sommervell*, 170 Misc. 602, 10 N. Y. Supp. (2d) 747; see *Mallory* v.

Wheeler, 151 Wis. 136, 138 N. W. 97; see also, *In re Turner*, 119 Fed. 231 (C. C., S. D. Iowa).

On authority of the habeas corpus cases, Charles Warren has categorically stated[23] that "it has been conclusively determined that the state courts possess no power to enjoin a federal official * * *." Another commentator[24] has similarly read these cases:

> No State can lawfully do an act which will suspend even for a moment the machinery of the national government * * *. This is fundamental in our duplex system of government, in which the constitution and laws of the United States and treaties made under its authority are the supreme law of the land.

Dicta in the decision of this Court point to the same result. *Tennessee* v. *Davis*, 100 U. S. 257, 262–263; *In re Neagle*, 135 U. S. 1, 61–62.

It might be argued that this analysis is merely a rephrasing of the rule that a suit against federal officers amounts in many instances to a suit against the United States; that, if the federal official is acting without proper authority, whether in the statute or in the Constitution, he acts only as an individual and not as an official; and hence

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[23] Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 358.

[24] Bishop, *Judicial Control of Federal Officers*, 9 Col. L. Rev. 397, 407. See also, *Power of a State Court to Enjoin N. L. R. B. Officials*, 36 Mich. L. Rev. 1344, 1347–1351.

that the federal officer may be brought before a state court upon a prayer for an injunction against him as an individual if only the complaint alleges that he is acting without proper authority. The same contention, however, has been made and has been rejected in the habeas corpus cases. *Tarble's Case*, 13 Wall. 397, 410–411. If allegations that the federal officer is acting without authority give to the state courts no power to determine whether or not a writ of habeas corpus should issue, similar allegations should correlatively confer upon the state courts no power to determine whether to issue a writ of injunction.

We have found no case in which a state court has been held, after consideration of this argument, authorized to enjoin a federal official.[25]

[25] In *Stanley* v. *Schwalby*, 162 U. S. 255, the Court ordered an action of trespass to try title, brought in the state courts against army officers, to be dismissed on the merits. And in *Scranton* v. *Wheeler*, 179 U. S. 141, the Court considered on the merits an action of ejectment brought in a state court against the federal officer in charge. In neither case did the Court consider the power of the state courts to entertain these actions, which would be followed by compulsory process akin to the decree of injunction, and in neither case did it affirm the decision on the merits. Again, in *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, the Court reversed on the merits mandamus and injunction actions against federally controlled carriers which had been brought in the state courts. But these cases are properly to be explained on the ground of the statutory waiver of immunity. See section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 451, 456.

Consequently the circumstance that suits for injunctions against federal officials are entertained in federal courts by no means establishes that an action at law seeking damages against such officers involves a federal question without more.

II. THE COURT BELOW DID NOT ERR IN REFUSING TO INSTRUCT THE DISTRICT COURT TO PERMIT THE FILING OF AN AMENDED COMPLAINT WHICH WAS SUBJECT TO THE SAME OBJECTIONS AS THE ORIGINAL

As before noted, petitioners' complaint in the district court charged a conspiracy among respondents to make unlawful arrests, imprisonments, and searches and seizures (R. 8-9, *et seq.*). This complaint was dismissed on April 24, 1944 (R. 137); petitioners appealed on April 28, 1944 (R. 138); and the appeal was argued in the court below on March 22, 1945 (R. 163). Thereafter, on April 30, 1945, while the appeal was under advisement, petitioners submitted in the court below a "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers", together with a "Motion to Reverse Judgment, with Instructions" to the district court to grant leave to file the amended complaint (R. 181, 186). Petitioners

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An early decision, decided long before the habeas corpus cases, held that an action of replevin against property held by a federal officer would lie in a state court. *Slocum* v. *Mayberry*, 2 Wheat. 1. It seems equally applicable to a bill for an injunction, but cannot be considered controlling at this date.

contend that the "Proposed Amended Complaint" eliminates the recital of conspiracy (Pet. Br. 16–17). However, neither decision below was grounded on any technical point of pleading, and the court below, although it denied petitioners' motion to file the amended complaint (R. 178–179), characterized the allegations of the original complaint as charging "that defendants, through the medium of unlawful and unreasonable searches and seizures, have violated" plaintiffs' rights under the Fourth and Fifth Amendments (R. 170). In point of fact, the "Proposed Amended Complaint" does not entirely eliminate the allegation of conspiracy (R. 190, par. VIII), and merely restates the allegations of the original complaint in argumentative style. It is in consequence subject to all the jurisdictional infirmities of the original pleading.

Moreover, the court below clearly did not abuse its discretion in denying the motion to reverse, which was filed a year after the original complaint was dismissed, and over a month after the argument on appeal. *Cf.* Rule 15 (a), F. R. Civ. P. This was long after the expiration of the six-months' period allowed for relieving a party from "a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect." Rule 60 (b), F. R. Civ. P. Indeed, not only was the action of the court below denying the motion a proper exercise of discre-

tion, but to have granted the motion would in all likelihood have been beyond the power of a circuit court of appeals. See *United States* v. *Newberry Mfg. Co.*, 123 F. (2d) 453, a decision in the First Circuit squarely in point on this phase of the case.

III. CONGRESS HAS NOT CONFERRED JURISDICTION OF CASES SUCH AS THIS ONE ON THE FEDERAL COURTS

It is axiomatic that the federal courts have only such part of their constitutional grant of jurisdiction as Congress has seen fit to confer upon them, and that in recent years the jurisdiction has been narrowed legislatively rather than widened. See *Gay* v. *Ruff*, 292 U. S. 25, 35–37; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 485; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113–114; *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, 288.

Undoubtedly, Congress could constitutionally bring a case such as this one within the constitutional jurisdiction of the federal district courts. It has already conferred upon such courts jurisdiction of suits at law or in equity authorized to be brought by any person to redress the deprivation, under color of *state* law, of any right, privilege, or immunity conferred by the Constitution. Section 24 (14), Judicial Code, 28 U. S. C. § 41 (14). It could similarly confer jurisdiction of like actions brought to redress such deprivations under color of *federal* law or authority—but it has not done so.

Just as the original jurisdiction of the district courts could be extended, so also could Congress enlarge the categories of those officers entitled to remove to a federal court proceedings brought against them by reason of acts done under color of their official authority. Such removals are presently limited to revenue officers, officers of United States courts, and officers of either House of Congress (see § 33, Judicial Code, 28 U. S. C. § 76), and to persons in the military service of the United States. 117th Article of War, 10 U. S. C. § 1589. Congress clearly has the power to confer upon all federal law enforcement officers, or upon only a limited class of them such as agents of the Federal Bureau of Investigation, the same rights of removal as are now available to revenue officers. Here again, Congress has not seen fit to take the additional step.

The questions of policy and convenience implicit in amendments to the Judicial Code such as those suggested above are for the legislature. It is sufficient for present purposes that Congress has not up to now so broadened the scope of the federal judicial power.

Acquiescence in the rule for which petitioners are contending would not in any sense establish the right of F. B. I. agents to be sued solely in the federal courts. For if petitioners' complaint had been silent on the Constitution and had been framed simply as a tort action against individual

trespassers, respondents would not have been able to remove the cause by virtue of allegations that they had been acting as federal officers. *Chappell* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Chaskin* v. *Thompson*, 143 F. (2d) 566 (C. C. A. 9). Consequently, from the point of view of protecting F. B. I. agents, of affording them at all times a federal forum in the event of suit, reversal here would simply mean that whether or not such agents could remain in the federal courts would depend entirely upon the option of the plaintiff's pleader.

Conversely, from the point of view of the distribution of judicial power between the state and federal courts, reversal would mean that all actions for false imprisonment and the like against any state law enforcement officer in the land, be he the humblest of village constables, could be brought within the original jurisdiction of the federal courts whenever the plaintiff's lawyer alleged action amounting to a deprivation of liberty without due process of law and cited the Constitution. What is here pleaded as action in violation of the Fifth Amendment could be alleged there as violative of the Fourteenth. The consequence would be an effective ouster of state court jurisdiction over actions seeking damages for lawless law enforcement brought against any and all state or municipal law enforcement officers.

To accede to petitioners' contentions here, therefore, would mean that the jurisdiction of the federal courts would be extended far beyond the limits now established by Congress and by the decisions of the courts, and in a way certain to disturb the relationship of the states to the Nation.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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